APPELLATE REVIEW OF ADMINISTRATIVE RULE MAKING IN OHIO—PROSPECTS FOR REVIVAL

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I. THE PROBLEM IN PERSPECTIVE

The typical state administrative agency[1] performs both legislative and judicial functions: a legislative role in adopting substantive regulations,[2] and a judicial role in applying predetermined legal obligations, established either by statute or regulation, to the facts and circumstances peculiar to a specific party. This dual role necessitates the use of an informed discretion on the part of the judiciary to ensure that judicial supervision of administrative actions is appropriate to the nature of the function being exercised by the agency. Inherent in the typical administrative program are competing interests in, on the one hand, minimizing collateral attacks on regulations in administrative or judicial actions to enforce them, and, on the other hand, ensuring adequate procedures for redress from abuses of the administrative agencies' legislative powers. In addition, determinations of legislative policy by an administrative agency deserve greater deference from the judiciary than the agency's adjudicatory determinations of law and facts.[3] The proper accommodation of these interests lies in adequate pre-enforcement judicial review[4] of the adoption of administrative regulations.

The interest in minimizing collateral attacks on the facial validity of a regulation is explained by the nature and purposes of the rule-making power. Regulations, to the extent they are consistent with the statutes enabling their adoption, constitute law that is judicially en-

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[1] The scope of this article is limited to judicial review of rule-making decisions by state administrative agencies. A listing of Ohio administrative agencies with power to adopt rules is set forth at the end of the pocket part to Title I, OHIO REV. CODE ANN. (Page Supp. 1975).

[2] The term "regulation" as used in this article is synonymous with the definition of a "rule" in OHIO REV. CODE ANN. § 119.01(C) (Page Supp. 1975):

> "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights.

[3] *See* 2 F. COOPER, STATE ADMINISTRATIVE LAW 781 (1965).

[4] As used in this article, the term "pre-enforcement judicial review" means a judicial determination of the validity of the promulgation of a regulation prior to administrative or judicial litigation to implement it.

forceable in the same manner as statutes.[5] Unlike statutes, however, regulations are an indispensable step between inchoate legislative guidelines and a concrete definition of standards of conduct that can be judicially enforced. They serve to fill in the details of more general statutory objectives, taking advantage of expertise in a relatively narrow problem area which the legislature cannot provide. Regulations express specific administrative policy choices, and provide advance notice of obligations to regulated parties. They limit agency discretion in implementing broadly defined statutory goals, thereby promoting uniformity and predictability of administrative decisions. Most significantly, regulations are the product of a procedure that, unlike adjudicatory procedure, exposes the agency's assumptions and policies for accomplishing statutory goals to public scrutiny, debate, and criticism. Adjudicatory procedure is antithetical to rule-making procedure in its preoccupation with resolving private controversies rather than formulating public policy.

Collateral attack on the facial validity of a regulation in private litigation, if not minimized, might undermine these beneficial attributes of rule-making procedure. Collateral challenges reach the courts in appeals from administrative adjudicatory orders entered either in specific applications of the regulations or in defense of civil or criminal charges brought for violations. Employment of these procedures to invoke judicial examination of the agency's rule-making action—as opposed to judicial examination of the regulation as applied—creates substantial and unnecessary difficulties for both the regulator and the regulated party. The court in these cases does not have before it the record of rule-making proceedings. Even if this record could be made available, the agency should not be forced to defend its legislative decisions in every adjudicatory proceeding that implements them, since this would be contrary to the legislative purpose in conferring substantive rule-making power upon the agency, and would reduce regulations to mere guidelines vulnerable to ad hoc exceptions. Nor should the rule-making action be vulnerable to judicial rejection on the basis of its application to a particular party, since its application to most other regulated parties might be wholly defensible. Regulated parties are also injured by the collateral attack approach; the opportunity for judicial determination of a regulation's validity should not arise only upon violation of the regulation and the attendant risk of sanctions.

Pre-enforcement judicial review of the adoption of regulations,

[5] *See, e.g.*, Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948).

in contrast to more traditional forms of litigation, is a far more appropriate procedure to redress administrative abuses of the rule-making power. Possible means of obtaining review are the declaratory judgment action and direct statutory appeal from the administrative rule-making order. The direct statutory appeal remedy, however, has been virtually foreclosed by the Ohio Supreme Court.[6] The declaratory judgment procedure, on the other hand, has recently received a lukewarm endorsement by the court.[7]

This article will attempt to demonstrate that the declaratory judgment procedure is not an adequate substitute for direct appeal, and that the availability of direct judicial review of rule-making orders is of major importance to both governmental and private interests.

II. THE DEMISE OF APPELLATE REVIEW OF THE PROMULGATION OF ADMINISTRATIVE REGULATIONS

Since 1942 the Ohio Supreme Court has, with few exceptions, disallowed judicial appellate review of the promulgation of administrative regulations. This deprivation of prompt appellate review, which would serve both the efficiency of the administrative programs and the protection of regulated parties from unlawful regulations, has been accomplished through a line of cases characterized by unpersuasive and often inconsistent reasoning.

A. *Zangerle v. Evatt*

The Ohio Supreme Court began its struggle with the propriety of judicial review of the promulgation of administrative regulations in *Zangerle v. Evatt*.[8] The case arose upon appeal of rule no. 2 to the Board of Tax Appeals by several county auditors. The rule as adopted by the Tax Commissioner reclassified oil refinery structures from real to personal property, thus lowering the valuation of such property for tax purposes. Upon the Board's affirmance of the lawfulness of rule no. 2, two county auditors appealed to the Ohio Supreme Court.[9] In a lengthy opinion, the court declined to review the

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[6] *See* Section II *infra*.

[7] *See* Section III *infra*.

[8] 139 Ohio St. 563, 41 N.E.2d 369 (1942). Further discussion of *Zangerle* and its progeny may be found in Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853 (1973), and Rutledge, *Administrative Review and the Ohio Modern Courts Amendment*, 35 OHIO ST. L.J. 41 (1974).

[9] General Code § 5611-2 (Page 1945) provided in pertinent part:

> The proceeding to obtain . . . reversal, vacation, or modification shall be by appeal to the supreme court of Ohio.
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> . . . .

Board's decision, and sua sponte dismissed the appeals. It cited three different grounds for denying judicial review of the regulation, and its reasoning on each is unpersuasive.

One basis for dismissal was the lack of a justiciable question. The court held that the lawfulness of a regulation may be challenged only in the context of the application of the regulation to a specific set of facts developed in an adjudicatory context.[10] It failed to recognize that there may be justiciable issues other than the proper application of the regulation to specific parties, such as infringement of constitutional guarantees, conflict with or extension beyond the enabling legislation, lack of minimally required rationality, or procedural errors in the promulgation of the regulation, which are apparent on the face of the regulation.

Another ground for dismissal was the absence as parties of the oil companies whose property was reclassified by the rule. The court concluded that the auditors lacked sufficient standing to present the issue in concrete terms,[11] and that to determine the validity of the rule in the absence of the oil companies would result in an advisory opinion binding on no one.[12] The court erroneously overlooked the fact that the auditors were within the class of persons authorized by statute to appeal to the Board of Tax Appeals and then to the supreme court;[13] and the auditors, as representatives of their respective political subdivisions, had a strong financial interest in a successful challenge to the rule. Because the requisite adversity of interests existed without the presence as parties of the oil companies,[14] their absence should not have defeated the auditors' sole remedy against a regulation that reduced revenues.[15]

The court's third and most troublesome basis for refusing to review the rule has caused significant difficulties in later actions

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> Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner . . . may be instituted . . . by the county auditor. . . .

Act of April 3, 1941, § 1, 117 Ohio Laws 34.

[10] 139 Ohio St. at 571, 41 N.E.2d at 373.

[11] *Id.* at 578, 41 N.E.2d at 376.

[12] *Id.* at 574, 41 N.E.2d at 374.

[13] *See* note 9 *supra.*

[14] A fundamental reason for the judicial rule against rendering advisory opinions is that the absence of an aggrieved party to zealously prepare and adequately litigate the factual and legal issues detracts from the quality of the court's decision-making process. *See* United States v. Fruehauf, 365 U.S. 146, 157 (1961).

[15] The effect of the court's ruling is to instruct persons benefited by a regulation to abstain from intervening to defend it in an appellate challenge, thus defeating such an appeal. The oil companies, presumably, could have intervened before the Board of Tax Appeals and the supreme court, although this opportunity was neither addressed nor recognized in the court's opinion.

seeking pre-enforcement judicial review of regulations. The Ohio constitution grants the court "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."[16] The court interpreted the term "proceedings" to include only "quasi-judicial" proceedings, and to exclude "quasi-legislative" proceedings such as the promulgation of regulations. It felt bound, therefore, to narrowly interpret the statute granting it appellate jurisdiction[17] as authorizing review of quasi-judicial orders only. By this constitutional interpretation of the scope of its appellate jurisdiction over the activities of administrative agencies, the court constructed a jurisdictional bar to *any* supreme court review of rule making.

The court's rationale for its interpretation of "proceedings" is wholly unpersuasive. It relied heavily on definitions of the term as employed in relation to trial courts. Of course, these tribunals perform only an adjudicatory function, and do not represent a proper analogy to the dual legislative and judicial role performed by administrative agencies. The court cited but did not follow broader definitions of "proceedings" which indicate that the term encompasses all activities appropriate to the body to which it is applied.[18] Furthermore, it did not consider the record of the debates of the constitutional convention, at which the term "proceedings" was chosen; there is no indication that the framers intended a distinction between quasi-legislative and quasi-judicial orders, and indeed there is evidence to the contrary.[19]

The court also failed to provide definitions for the terms "quasi-judicial" and "quasi-legislative," which are needed to construct a distinction of constitutional import. This failure is compounded in later cases in which the court struggled unsuccessfully to adopt consistent and workable definitions.[20] Moreover, to make legal rights turn upon these labels places too great an emphasis on the procedural distinction between rule making and adjudication, for substantive administrative decisions may be imposed through either procedure.[21]

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[16] OHIO CONST. art. IV, § 2(B)(2)(c).

[17] *See* note 9 *supra.*

[18] 139 Ohio St. at 570, 41 N.E.2d at 372.

[19] 2 OHIO CONSTITUTIONAL CONVENTION: PROCEEDINGS AND DEBATES 1118 (1913).

[20] *See, e.g.*, M.J. Kelley Co. v. City of Cleveland, 32 Ohio St. 2d 150, 290 N.E.2d 562 (1972); Haught v. City of Dayton, 34 Ohio St. 2d 32, 295 N.E.2d 404 (1973); DeLong v. Board of Educ., 36 Ohio St. 2d 62, 303 N.E.2d 890 (1973).

Kelley, Haught and *DeLong* discredit the quasi-legislative, quasi-judicial distinction, for in each the court foreclosed judicial review on grounds unrelated to the substance of the administrative order, and left unclear the types of orders over which the court would exercise jurisdiction.

[21] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 (1958); Rutledge, *Administrative Review and the Ohio Modern Courts Amendment*, 35 OHIO ST. L.J. 41, 52 (1974).

In sum, the court's determination that a matter as fundamentally important as appellate jurisdiction rests upon a superficial distinction between "quasi-legislative" and "quasi-judicial" administrative orders is lamentable and ultimately unworkable.

Whatever the shortcomings of the court's reasoning in *Zangerle*, that case established the supreme court's strong disfavor of appellate review of the adoption of administrative regulations. With only two exceptions,[22] later appeals from the adoption of regulations reached the same result. Although the reasoning in each is not wholly consistent, these cases incorporate and preserve the errors of *Zangerle*.

B. *Craun Transportation, Inc. v. Public Utilities Commission*

Craun Transportation, Inc. v. Public Utilities Commission[23] was the next attempt to obtain appellate review of the adoption of administrative regulations that reached the supreme court. The Commission adopted an order that set out regulations for motor transportation freight carriers. The carriers appealed to the supreme court, contending that the regulations were violative of the Ohio and federal constitutions. The court dismissed sua sponte on the sole ground that the adoption of a regulation, unlike the application of a regulation to a specific set of facts, does not present a justiciable question,[24] thus preserving the branch of *Zangerle* which failed to recognize the possibility of well defined issues on the face of regulations. The court thus required the carriers to violate the regulations and face severe sanctions before it would afford them an opportunity to vindicate their claimed constitutional rights. Its holding significantly impaired the carriers' ability to challenge unlawful regulations.

C. *Morgan County Budget Commission v. Board of Tax Appeals*

The court returned to the jurisdictional holding of *Zangerle* in *Morgan County Budget Commission v. Board of Tax Appeals.*[25] In this case, the Board was petitioned by the Ohio Power Company to review the budget for Morgan County adopted by the Budget Commission. To determine reviewability of the Board's order, the court departed from the justiciability analysis in *Craun* and invoked that portion of *Zangerle* which limited appellate jurisdiction of the court to "quasi-judicial" administrative orders. However, it concluded that

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[22] Morgan County Budget Comm. v. Board of Tax Appeals, 175 Ohio St. 225, 193 N.E.2d 145 (1963); Haught v. City of Dayton, 34 Ohio St. 2d 32, 295 N.E.2d 404 (1973).

[23] 162 Ohio St. 9, 120 N.E.2d 436 (1954).

[24] *Id.* at 10, 120 N.E.2d at 437.

[25] 175 Ohio St. 225, 193 N.E.2d 145 (1963).

the appellee's failure to contest jurisdiction required the court to assume that the order was quasi-judicial and properly before it, in effect permitting the parties to determine the scope of the court's appellate jurisdiction. Moreover, while *Zangerle* provided that the original order, and not the nature of the Board's review of that order, governed reviewability, the court in *Morgan County* strongly indicated that, had it reached the issue, it would have determined reviewability with reference to the Board's proceedings and resultant order.[26] This uncertainty about what constitutes an appealable order and about the effect on this determination of the failure to request dismissal casts further doubt upon the wisdom of the court's jurisdictional holding in *Zangerle*.

D. *Fortner v. Thomas*

The two branches of *Zangerle* affirmed in *Craun* and *Morgan County* reappeared in *Fortner v. Thomas*.[27] *Fortner* required the court to examine for the first time the Administrative Procedure Act,[28] which governs the procedure of most state agencies.[29] Like the statutes invoked in earlier appeals, Revised Code § 119.11[30] permitted judicial appellate review of rule making, commencing in the court of common pleas. In *Fortner*, the Ohio Liquor Control Commission had amended a regulation[31] imposing added responsibilities on barkeepers, which amendment was appealed by a holder of a liquor permit to the court of common pleas. Further appeals brought the action to the supreme court, which held that the court of common pleas should have dismissed. It quoted extensively from *Zangerle* in holding that a justiciable question is presented only upon the specific application of a regulation, and held that the amended regulation had not been applied to the appellant, thus foreclosing judicial review. As

[26] *Id.* at 227 n.2, 193 N.E.2d at 146 n.2.

[27] 22 Ohio St. 2d 13, 257 N.E.2d 371 (1970).

[28] OHIO REV. CODE ANN. §§ 119.01-.13 (Page 1969).

[29] The procedures for appeals from the Board of Tax Appeals and the Public Utilities Commission are governed by separate statutes specifically applicable to each agency. OHIO REV. CODE ANN. § 5717.04 (Page 1973) (Board of Tax Appeals); OHIO REV. CODE ANN. § 4903.12 (Page 1954) (Public Utilities Commission).

[30] OHIO REV. CODE ANN. § 119.11 (Page 1969) provided in pertinent part:

> Any person adversely affected by an order of an agency in adopting, amending, or rescinding a rule or adopting, readopting, or continuing a rule, amendment, or rescission previously adopted as an emergency rule as provided in Section 119.03 of the Revised Code, may appeal to the court of common pleas of Franklin county on the ground that said agency failed to comply with the law in adopting, amending, rescinding, publishing, or distributing said rule, or that the rule as adopted or amended by the agency is unreasonable or unlawful, or that the rescission of the rule was unreasonable or unlawful.

[31] Ohio Liquor Control Commission Reg. LCc-1-52.

in both *Zangerle* and *Craun*, the facts of *Fortner* belie the court's conclusion that the regulation had not yet been applied to the appellant. The amendment had the effect of immediately imposing upon the permit holder responsibility for any employee who allowed "improper conduct" on the licensed premises. Violation placed the permit holder in jeopardy of revocation. Therefore, the regulated party was again left without an effective appellate remedy to challenge an allegedly unlawful regulation.

The principal error of *Fortner*, however, is its extension to the courts of common pleas of *Zangerle's* jurisdictional holding limiting review to quasi-judicial orders. The grant of jurisdiction to the courts of common pleas is provided by the recent Modern Courts Amendment to the Ohio constitution: "The courts of common pleas and divisions thereof shall have . . . such powers of review of proceedings of administrative officers and agencies as may be provided by law."[32] The court reasoned that employment of the term "proceedings" indicated the framers' intent to invoke the interpretation of that term set forth in *Zangerle*—again giving this interpretation constitutional import—and thus rendered ineffective the clear purpose of the General Assembly to provide for prompt judicial review of administrative regulations. *Fortner* thus compounded the error of *Zangerle* by engrafting its jurisdictional limitation upon the constitutional definition of the jurisdiction of yet another court.[33]

Shortly after it decided *Fortner*, the court rendered a decision concerning review of rule making by way of a declaratory judgment action which raised many questions about the continued vitality of *Zangerle* and its progeny. It is to that decision which the discussion now turns.

III. THE EMERGENCE OF THE DECLARATORY JUDGMENT AS A SUBSTITUTE OPPORTUNITY FOR REVIEW

A. *Burger Brewing Co. v. Liquor Control Commission*[34]

On June 16, 1970, the Ohio Liquor Control Commission adopted regulation LCc-1-73[35] at the behest of Ohio beer distribu-

[32] OHIO CONST. art. IV, § 4(B). Prior to the Modern Courts Amendment of 1968, the courts of common pleas were granted jurisdiction as "fixed by law." OHIO CONST. art. IV, § 4 (1851).

[33] The holding regarding Revised Code § 119.11 is surprising in that the court refrained from finding the section unconstitutional. The court presumably felt the statute performed a function other than providing for appellate review of rule making. The language of the section, however, indicates no other purpose; Justice Duncan urged a holding of unconstitutionality for this very reason in his concurring opinion. His view was adopted, and the statute finally declared invalid, in Rankin-Thoman, Inc. v. Caldwell, 42 Ohio St. 2d 436, 329 N.E.2d 686 (1975). *See* Section V.A. *infra*.

[34] 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).

[35] The enabling authority upon which this regulation was predicated is set forth in Revised

tors. It involved a complex set of controls over price changes initiated by breweries and wholesale distributors. The apparent purpose of the regulation was to avoid anticompetitive pricing, but the regulation had the practical effect of increasing the marketing autonomy of wholesalers. Shortly after the adoption of regulation LCc-1-73, and prior to any attempt to enforce it, nine brewing companies licensed and regulated by the Commission challenged its validity by filing suit in the court of common pleas for Franklin County. The complaint requested that the court determine whether Revised Code § 119.11 or § 119.12 was the proper appellate procedure to protect plaintiffs' rights against allegedly unlawful rule-making action. Should the court determine that no appeal was open under either section, the complaint alternatively requested a declaratory judgment[36] that the regulation was invalid.

The brewers' complaint skillfully capitalized on the defects in the logic of *Fortner*. In addition to alleging that there had been procedural errors in the regulation's adoption,[37] and that the Commission lacked statutory authority to promulgate such price regulations,[38] the complaint alleged infringement of five separate constitutional rights. The complaint's most crucial element was the allegation that the regulation threatened the breweries' multimillion dollar investment and the jobs and welfare of the breweries' employees since one of the sanctions for its violation was revocation of the brewers' permits. The brewers contended that if *Fortner* were interpreted as holding that there can be no judicial review of the adoption of rules and regulations by quasi-legislative action of administrative agencies, then administrative rule-making power was a deprivation of due process and equal protection under both the Ohio and federal constitutions. How could the courts require that the regulation be violated, at the risk of such a severe sanction, before the brewers had the

Code chapters 4301 and 4303. The procedure applicable to the adoption of this regulation is set forth in Revised Code § 119.03.

[36] OHIO REV. CODE ANN. § 2721.03 (Page 1954) provides:

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in § 119.01 of the Revised Code, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under such instrument, constitutional provision, statute, rule, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

[37] The complaint alleged that no "order" was made by the Commission in adopting the regulation, as required by Revised Code § 119.03(D), and that no "effective date" was designated for the regulation, as required by § 119.04(A)(3).

[38] The complaint alleged that such price regulations were expressly prohibited by Revised Code § 4301.041 and 4301.05.

opportunity to vindicate the substantial statutory and constitutional rights alleged?[39] But on the other hand, how could the brewers' attempt to obtain judicial review of administrative rule-making action in the absence of "quasi-judicial" proceedings overcome the jurisdictional barriers declared by *Zangerle* and *Fortner*? Counsel for the brewers had bluntly placed the courts on the "horns of a dilemma"[40] not unlike that suffered by their clients.

The Ohio Supreme Court found *Fortner* dispositive on the issue of appeal under Revised Code § 119.11,[41] but went on to find that the declaratory judgment action was an available remedy and was not precluded by *Fortner*. The first paragraph of the syllabus stated:

> An action for a declaratory judgment to determine the validity of an administrative agency regulation may be entertained by a court, in the exercise of its sound discretion, where the action is within the spirit of the Declaratory Judgment Act, a justiciable controversy exists between adverse parties, and speedy relief is necessary to the preservation of rights which may otherwise be impaired or lost.[42]

The significant element of the *Burger Brewing* decision is paragraph two of the syllabus, which raised many more questions than it resolved. It distinguished *Fortner* as follows: "Where the prerequisites for entertaining such an action are met, an action for a declaratory judgment upon the validity of an administrative agency regulation does not constitute a judicial review of quasi-legislative proceedings of such agency."[43] The court's opinion set forth several prerequisites to the availability of the declaratory judgment remedy, relying upon *American Life & Accident Insurance Co. v. Jones*[44] to define the three elements necessary to action: (1) a real controversy between the parties, (2) which is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties.

As to the requirement of a "real controversy," the court cited

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[39] It certainly would be anomalous to allow the legislature to avoid judicial review of legislative action by transferring the legislative power to an administrative agency rather than directly exercising it. Had regulation LCc-1-73 been enacted as a statute by the legislature, its constitutionality could have been tested under Revised Code § 2721.03. *See* note 36 *supra*.

[40] 34 Ohio St. 2d at 99, 296 N.E.2d at 265.

[41] *Id.* at 95-96, 296 N.E.2d at 263.

[42] *Id.* at 93, 296 N.E.2d at 262.

[43] *Id.* The court in *Fortner* did not state or imply that exclusion from the "quasi-legislative" category ensures reviewability; it held only that *inclusion* in the category of "quasi-judicial proceedings" is a prerequisite of appeal under article IV, § 4(B).

[44] 152 Ohio St. 287, 89 N.E.2d 301 (1949).

Peltz v. South Euclid[45] as holding that the action must be "between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment."[46] The court concluded that the facts of *Burger Brewing* met this "real controversy" test:

> On one side of the controversy are the manufacturers seeking a judgment declaring the regulation void in order to avoid its economic constraints; on the opposite side are the wholesalers, invoking the regulation to set a ratio of the price charged them and the retailers.[47]

Conspicuously absent from the court's analysis is the interest of the state, represented by the Liquor Control Commission.[48]

The court relied upon the two-fold test in *Toilet Goods Association v. Gardner*[49] to supply the details of the "justiciability" requirement, stating that it was necessary "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage."[50] The facts in *Burger Brewing* considered by the court as satisfying the "appropriate for judicial resolution" criterion were briefly and ambiguously described:

> Hearings were held, and briefs were submitted before the commission drafted the regulation in its present form. The regulation was promulgated and became effective in August 1970.
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> There is sufficient information in the record upon which this court can base its decision. The regulation need not be violated to present a justiciable controversy because the regulation itself essentially involves legal questions. We are not asked to adjudicate rights and obligations in a "vacuum" which was decried by this court in *Fortner v. Thomas* . . . .[51]

The second branch of the *Toilet Goods* "justiciability" formula was also found to be satisfied in *Burger Brewing*:

> Regulation LCc-1-73 is self executing. There is no enabling legislation necessary to give it validity; nor is there any other agency

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[45] 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967).

[46] 34 Ohio St. 2d at 97, 296 N.E.2d at 264.

[47] *Id.*

[48] The court's emphasis on the presence of the wholesalers creates doubt as to whether there would have been a "real controversy" if the wholesalers had not intervened as defendants. This brings to mind the court's emphasis in *Zangerle* on the absence of the oil companies whose property was reclassified. *See* text accompanying notes 11-15 *supra.*

[49] 387 U.S. 158 (1967).

[50] 34 Ohio St. 2d at 97, 296 N.E.2d at 264.

[51] *Id.* at 97-98, 296 N.E.2d at 264-65 (citation omitted).

> involved in the enforcement of the regulation, at whose discretion the regulation could be enforced or ignored; for the Liquor Control Commission has its own enforcement division.
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> The regulation has a present and direct effect on the personal rights of the plaintiffs.[52]

Finally the court concluded that "speedy relief" was indeed necessary in the *Burger Brewing* case:

> Regulation LCc-1-73, on its face, specifically regulates the plaintiffs' businesses—their pricing and marketing systems. There is no aspect of their businesses that is more crucial to success than pricing and marketing.
>
> In order for plaintiffs to comply with the regulations, they must change the methods that have been traditionally used in pricing. . . .
>
> Since the plaintiffs are convinced that the regulation is invalid, they are placed in a perplexing dilemma: Either change their customary pricing and marketing procedures in order to conform with the regulation, or challenge the regulation by disobedience and face severe sanctions.[53]

One can see that the *Burger Brewing* opinion gives the practitioner little guidance on when a declaratory judgment action is available to determine the validity of an administrative regulation.

B. *The Incongruity of* Burger Brewing *and* Fortner

Burger Brewing held that a declaratory judgment action is a permissible procedure to determine the validity of an administrative regulation, although a direct appeal under Revised Code § 119.11 is not. The court failed to demonstrate how the declaratory judgment procedure it sanctioned differed from the direct appeal procedure it foreclosed.

The reaffirmance of *Fortner* in *Burger Brewing* was ambiguous about which principle was being reaffirmed. The opinion merely concluded that "In *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, this court had before it a Liquor Control Commission regulation. It held that such a regulation could not be reviewed under R.C. 119.11. Thus *Fortner* is dispositive of the appeal in this case under R.C. 119.11 . . . ."[54] The remainder of the *Burger Brewing* opinion is inconsist-

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[52] *Id.* at 98, 296 N.E.2d at 265.

[53] *Id.* at 98-99, 296 N.E.2d at 265.

[54] *Id.* at 96, 296 N.E.2d at 263.

ent with both branches of *Fortner*, for *Burger Brewing* concluded that "quasi-judicial" proceedings are not a condition precedent to jurisdiction, and that attempts to challenge the validity of administrative regulations are not per se nonjusticiable.[55]

The court's reasons for approving the declaratory judgment procedure were also unclear. The court seemed to be struggling to provide what it perceived to be a necessary remedy without overruling *Fortner*.[56] The three reasons presented in *Burger Brewing* for giving effect to Revised Code § 2721.03 would, however, also support a decision to give effect to Revised Code § 119.11. First, the court recognized that Revised Code § 2721.03 unequivocally conferred a judicial remedy to determine the validity of a regulation.[57] The direct appeal sought in *Fortner* stands on the same footing, since Revised Code § 119.11 demonstrates with even greater clarity the legislative intent to create a means for obtaining judicial review of a regulation. Second, the court observed in *Burger Brewing* that "[t]here is sufficient information in the record upon which this court can base its decision."[58] Revised Code §§ 119.03 and 119.11, by comparison, assure the presentation of a complete record of rule-making proceedings to the reviewing court. Should the rule-making record prove inadequate, the reviewing court should hold the agency accountable rather than foreclose the appellant from redress. Finally, the court considered the potential sanctions for violation of the regulation—revocation of appellants' liquor permits—as constituting a "threat of irreparable injury."[59] Under this test, *any* regulation that could be enforced by license revocation would threaten regulated parties with "irreparable injury." It is not clear from *Burger Brewing* whether the severity of the potential sanction alone determines whether "irreparable injury" exists. It is clear, however, that the concept of "irreparable injury" as used in *Burger Brewing* is sufficiently close to the requirement in Revised Code § 119.11 that an appellant be "adversely affected" to eliminate any practical difference between the two.

After reaffirming *Fortner* and condoning the declaratory judgment procedure, the *Burger Brewing* court attempted to distinguish *Fortner*. Two separate grounds were given in support of the distinc-

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[55] *See* section III(A) *supra*.

[56] The *Burger Brewing* opinion implicitly favors the appellants with a presumption that the remedy sought is proper if *Fortner* can be distinguished, thereby completely ignoring the constitutional phraseology that had been construed so unyieldingly to dictate the results reached in *Fortner* and *Zangerle*.

[57] 34 Ohio St. 2d at 96, 296 N.E.2d at 263-64.

[58] *Id.* at 98, 296 N.E.2d at 265.

[59] *Id.* at 99, 296 N.E.2d at 265.

tion. The reasoning underlying each is wholly unconvincing.

The first ground for distinguishing *Fortner* appears to be based upon some unexplained fundamental difference in the "relief sought":

> First, the plaintiffs in *Fortner* sought *review* of an administrative regulation under R.C. 119.11. Relief sought in the nature of a declaratory judgment is distinctly different from the relief sought in an administrative review. Furthermore, if judicial or quasi-judicial proceedings were necessary before a declaratory judgment could be granted, an action for such a judgment would be little more than a substitute for direct appeal. It is the very purpose of declaratory judgment actions to provide a determination as to the validity of a statute, ordinance, or agency regulation.[60]

It is most unfortunate that the court omitted any explanation of its reason for underscoring "review" or of the "distinct difference" it saw between "relief sought in the nature of a declaratory judgment" and "relief sought in an administrative review." It appears that the relief sought in both cases is identical, as demonstrated by the brewers' simultaneous filing under Revised Code §§ 119.11 and 2721.03 for the exact same redress.

The third sentence in the statement quoted necessarily implies that the jurisdiction of courts of common pleas under article IV, § 4(B) of the Ohio constitution is not confined to review of "quasi-judicial" proceedings. However, *Fortner*'s holding to the contrary was unqualifiedly reaffirmed in *Burger Brewing*. If it can be inferred from *Burger Brewing* that the court realized that its "quasi-legislative," "quasi-judicial" test for determining jurisdiction was erroneous, it is inexcusable that direct appellate review of rule making was not resurrected.

The court also attempted to distinguish *Fortner* on factual grounds:

> Second, *Fortner* is also distinguishable on its facts. There the court was concerned with "*premature* declarations or advice upon *potential* controversies," and the court decided that this was the status of Fortner who "had never been directly subjected to the application of the amended regulation."
>
> Here, plaintiffs are presently subjected to the application of Regulation LCc-1-73 as heretofore shown. Consequently, a declaratory judgment . . . would not constitute mere advice upon a potential controversy.[61]

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[60] *Id.* at 99, 296 N.E.2d at 265-66 (citation omitted).

[61] *Id.* at 99-100, 296 N.E.2d at 266.

The court's portrayal of its decision in *Fortner* was in error, for the second branch of *Fortner* held that review of a regulation necessarily fails to present a justiciable question. If justiciability is to be determined through a case-by-case analysis of the specific facts involved, as *Burger Brewing* provides, direct appeal of rule making should not have been defeated by the diametrically opposite premise that *all* appeals from "quasi-legislative" administrative actions are per se nonjusticiable.

In addition, there is absolutely no basis for the conclusion that Fortner "had never been directly subjected to the application of the amended regulation" while Burger and the other brewers were "presently subjected to the application of LCc-1-73."[62] Burger and Fortner were affected in essentially the same manner by the regulations they challenged, and both faced comparable sanctions, including license revocation, for violation of the regulations.

However unfortunate and confusing the court's reaffirmance of *Fortner* may be, *Burger Brewing* was clearly a step in the right direction. Instead of relying upon the "quasi-legislative," "quasi-judicial" distinction to determine jurisdiction, the court more properly focused on the presence of standing, ripeness, and justiciability.

IV. THE ADVANTAGE OF DIRECT REVIEW OVER DECLARATORY JUDGMENTS

Burger Brewing seems to reflect the court's recognition that it had painted itself into a corner by the overbreadth of the conclusion in the line of cases from *Zangerle* through *Fortner*. In refusing to follow *Fortner* to its logical conclusion, the court in *Burger Brewing* finally accepted the premise that pre-enforcement judicial review of administrative regulations is both necessary and desirable.[63] The practical effect of *Burger Brewing* is to substitute a declaratory judgment action for direct appeal.

Unfortunately, the declaratory judgment procedure for obtaining review has a number of infirmities. Its most serious defect is in permitting a new and independent trial on the merits[64] rather than confining review to the administrative record of proceedings upon which the rule-making decision is based.[65] Normally in the process

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[62] *Id.*

[63] *See* Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853, 876-77 (1973).

[64] In *Burger Brewing*, for example, the common pleas court held an evidentiary hearing in which the plaintiffs put on witnesses to testify against the regulation in question.

[65] The content of the record of rule-making proceedings for purposes of an appeal under Revised Code § 119.11 is spelled out in Ohio State Fed'n of Licensed Nursing Homes v. Public Health Council, 113 Ohio App. 113, 116, 172 N.E.2d 726, 728 (Ct. App. 1961):

of appellate review new allegations of fact and items of proof tendered for the first time on appeal are not permitted.[66] In the context of judicial review of administrative regulations, the new evidence presented in a declaratory judgment action directly interferes with the rule-making function by placing the court in the position of independently assessing legislative facts developed in a de novo evidentiary hearing. By basing its decision upon the evidence presented at trial, the court necessarily substitutes its judgment for that of the administrative agency.[67] Moreover, the declaratory judgment procedure followed in *Burger Brewing* is an invitation to regulated parties to withhold relevant evidence from the rulemaker in order to gain a tactical advantage in a subsequent judicial attack on the regulation. Direct appeal under Revised Code § 119.11, by contrast, limits the reviewing court to the record adduced on the proposed regulation prior to its final adoption by the agency. Broad based public participation, which provides all proponents and opponents of the proposed regulation with notice and an opportunity to be heard before the agency takes any final action, is the touchstone of rule-making procedure.

Confinement of pre-enforcement judicial review of a regulation to the record of the agency's rule-making proceedings has numerous advantages. It promotes more competent rule making, since the justification for a regulation must be documented in the record.[68] A pro-

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> A "record of proceedings" means a record of compliance with all the procedural requirements of Section 119.03, *i.e.*: (A) public notice of the proposed rules; (B) filing with the Secretary of State; (C) notice of public hearing, all written evidence or exhibits, a transcript of oral testimony and rulings; (D) the order adopting the rule and the rules adopted and, (E) proof of a reasonable effort to inform affected persons.

The issue of what constitutes an adequate record for purposes of meaningful judicial review of administrative rule making involves complexities beyond the scope of this article. It is important to recognize here that the adequacy of the rule-making record is of great significance to the process of review.

[66] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); F. JAMES, CIVIL PROCEDURE § 11.3, at 525 (1965).

[67] A court should not substitute its judgment for that of administrators but rather should determine whether the administrative action involved was lawful and appropriate on the basis of the record that was before the administrator. 2 F. COOPER, STATE ADMINISTRATIVE LAW 781 (1965).

[68] Meaningful judicial review of a regulation is impossible in the absence of an intelligible record demonstrating the basis for the agency's decision. Two decisions of Ohio courts of appeals under Revised Code § 119.11 demonstrate confusion on this point. *In re* Board of Liquor Control's Amendments, 115 Ohio App. 243, 245, 184 N.E.2d 767, 768-69 (1961), *followed in* Long v. Division of Watercraft, 118 Ohio App. 369, 370, 195 N.E.2d 128, 129 (1963), holds that in rule-making proceedings under Revised Code § 119.03:

> The administrative agency has no obligation to support the reasonableness of its proposal—except in the sense of the practical desirability of rebuttal, especially in the light of the limitation on evidence on an appeal under Section 119.11, Revised Code. . . .

per record would demonstrate the specific evidence available to the agency and the policy considerations upon which the regulation is predicated. This exposure of the agency's reasoning and policy choices to public scrutiny is an advantage unique to the administrative rule-making procedure.[69] In contrast, litigation by specific parties, as in a declaratory judgment action, skews the balance of diverse interests affected by most regulations, and may result in judicial rejection of a regulation on the basis of its effect upon an isolated interest.[70] This problem is most severe in relation to the increasingly common "resource allocation" regulations, where one regulatee's gain must be offset by a commensurate loss for other regulatees.[71]

Another disadvantage of the declaratory judgment procedure is the absence of a time limitation for filing challenges to a regulation. This impedes the obvious interest of all concerned in a prompt judicial determination of the regulation's facial validity. Belated challenges may create retroactivity problems if the regulation has been applied or enforced in a great number of cases.[72] Moreover, the abil-

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> [Section 119.11] does not require the court to affirmatively find that the action is supported by reliable, probative and substantial evidence. It requires only that the court determine whether the procedure was proper and whether the rule adopted is reasonable and lawful.

It is difficult to understand how a reviewing court is to determine that a challenged regulation is "reasonable" unless there is a basis in the record for that conclusion. See the discussion of these cases in Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853, 874-75 (1973). *In re Bd. of Liquor Control's Amendments* and *Long* misconstrue the scope of review prescribed by the "reasonable and lawful" test, which is *broader* than that under the "substantial evidence" test. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07, at 149 (1958).

[69] Professor Davis, describing administrative rule-making procedure as "one of the greatest inventions of modern government," analogizes it to the legislative committee system and notes its advantages over "retroactive" law making through adjudication. 1 K. DAVIS, ADMINISTRATIVE LAW § 6.15, at 283-85 (Supp. 1970).

[70] The opportunity for a litigant in a declaratory judgment action to build a de novo record of facts most favorable to its claims tends to exclude from the court's consideration interests of nonparty proponents of the regulation. In this respect *Burger Brewing* is inconsistent with the sixth paragraph of the *Zangerle* syllabus: "It is the duty of courts to insist that everything upon which they are to base an order or judgment must be before them in such a way that no one to be affected may be deprived of full opportunity to explain or refute such order or judgment . . . ." 139 Ohio St. at 563, 41 N.E.2d at 369.

[71] Environmental protection standards are good examples of "resource allocation" regulations: the total amount of pollution abatement necessary is a given, but the mix of pollution abatement measures necessary from each individual contributing source in order to arrive at that total is variable. OHIO REV. CODE ANN. §§ 3704.03(E), 6111.03(J) (Page Supp. 1975).

[72] The retroactivity problem is particularly acute for the many licensing programs administered by state agencies. It is conceivable that an agency could process thousands of licenses under a given regulation and thereafter, as a result of a declaratory judgment action, be apprised that the regulation was ultra vires and void. Presumably, the licenses already processed would have to be rescinded or modified.

ity to file a complaint at the plaintiff's convenience means that the declaratory judgment procedure can easily be used to circumvent and confuse administrative adjudicatory proceedings.[73]

The declaratory judgment procedure has other drawbacks. It undermines the purpose of direct review provisions to provide consistent decisions on the validity of regulations, and invites forum shopping among the eighty-eight different common pleas courts.[74] Furthermore, *Burger Brewing* is unclear about when a declaratory judgment will lie. It appears that some substantive regulations are potentially reviewable while others are not, for the opinion is replete with contingencies on the availability of a declaratory judgment. Must the regulation be "self-executing,"[75] and if so, what does that term mean? Is review unavailable unless the regulation involves "essentially legal questions"[76] as in *Burger Brewing*? Is it necessary to have adverse parties other than the agency?[77] The likelihood of a consistently available remedy in meritorious cases is much too remote.

Despite the court's statement in *Burger Brewing* that a declaratory judgment is "distinctly different" from direct appellate review,[78] the final decision on the merits in *Burger Brewing* was in substance equivalent to a decision on direct appeal, as it constituted judicial review of the lawfulness of a rule-making decision. The court, after invalidating a preferable appellate procedure on the basis of faulty reasoning in *Zangerle* and *Fortner*, refused to correct its error and merely established an unacceptable alternative upon equally infirm grounds.

V. RECENT DEVELOPMENTS

Having determined that direct review of the promulgation of administrative regulations is far superior to actions in declaratory judgment, the next question is how to construct such a remedy in a manner acceptable to the Ohio Supreme Court. In its 1975 term, the

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[73] It is possible that many declaratory judgment actions challenging the validity of a regulation would be filed on the eve of the agency's attempt to enforce the regulation. The pendency of such an action might well have a "chilling effect" on the agency's conduct of an adjudicatory hearing to force compliance with the regulation. There would doubtless be some instances in which the trial court would stay or enjoin an agency's proceeding to force compliance until the merits of a declaratory judgment action had been decided.

[74] A plaintiff may be able to perfect venue in his home county in an action for a declaratory judgment contesting the validity of a state administrative regulation. *See* OHIO R. CIV. P. 3(B), (E).

[75] 34 Ohio St. 2d at 98, 296 N.E.2d at 265.

[76] *Id.* at 98, 296 N.E.2d at 265.

[77] *Id.* at 97, 296 N.E.2d at 264.

[78] *Id.* at 99, 296 N.E.2d at 265.

court rendered three decisions in appeals from rule-making orders of state agencies. These decisions warrant close analysis in order to detect any modification of the court's disapproval of rule-making appeals.

A. *Rankin-Thoman, Inc. v. Caldwell*

The first case was a consolidation of two appeals, *Rankin-Thoman, Inc. v. Caldwell* and *American Electric Power Co. v. Chief of Division of Forestry and Reclamation*.[79] Both involved appeals from rule-making orders of state agencies to the court of common pleas pursuant to Revised Code § 119.11.[80] Speculation that the court had granted certiorari to reconsider *Fortner* was proven inaccurate, for in the first paragraph of its opinion the court reaffirmed the holding of *Fortner* and *Burger Brewing* that Revised Code § 119.11 cannot be used to obtain appellate review of administrative rule making.

Having quickly affirmed the dismissals below, the court addressed two loose ends left by previous cases. First, it accepted the conclusion of the concurring opinion in *Fortner* that the court should flatly declare Revised Code § 119.11 unconstitutional. Second, it addressed the issue of what constitutes an appealable quasi-judicial administrative order:

> The distinction between quasi-legislative and quasi-judicial proceedings has sometimes been predicated upon procedural differences. Quasi-judicial proceedings require notice, hearing, and the opportunity for introduction of evidence. . . . Quasi-legislative proceedings do not. More frequently, however, courts have examined the nature of the proceedings themselves, to ascertain whether they involve the making or revising of rules, rather than the application of rules in an adjudicatory manner.[81]

Thus, some thirty-three years after the decision in *Zangerle*, the court had not yet clearly delineated those orders subject to appellate review under *Zangerle* and *Fortner*. Not only did it fail to clarify the quasi-legislative, quasi-judicial distinction, but it also failed to address the persuasive arguments of appellants that this distinction should be wholly abandoned in favor of the exercise of legislatively conferred jurisdiction over justiciable challenges to all administrative orders.

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[79] 42 Ohio St. 2d 436, 329 N.E.2d 686 (1975).

[80] At issue in *Rankin-Thoman* were regulations adopted by the State Fire Marshall setting forth the state fire code. These regulations included provisions concerning mandatory fire warning systems in all household dwellings of more than one unit. The appellant in *American Electric* challenged regulations governing reclamation of strip-mined land.

[81] 42 Ohio St. 2d at 438, 329 N.E.2d at 688.

B. *Union Camp Corp. v. Whitman*

Rankin-Thoman represents no retreat from *Zangerle* and *Fortner*; but a rule-making appeal decided the same day suggests a way to avoid the major tenet of those cases. In *Union Camp Corp. v. Whitman*,[82] the Director of Environmental Protection had adopted and modified regulations which governed the permissible levels of pollution from stationary sources of air contaminants. Union Camp appealed the rule-making order to the Environmental Board of Review,[83] and then appealed the order of the Board to the court of appeals pursuant to Revised Code § 3745.06.[84] The appellate court dismissed, citing *Fortner*, because of the quasi-legislative nature of the Director's action. The supreme court reversed, remanding the case to the court of appeals.

Union Camp presented the supreme court with the first rule-making appeal in which the initial judicial appellate tribunal was neither a court of common pleas nor the supreme court. The significance of this distinction becomes clear upon examination of article IV, § 3(B)(2) of the Ohio constitution: "Courts of appeals shall have . . . such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies." Lacking is the term "proceedings," which *Zangerle* and *Fortner* held limited the appellate jurisdiction of the supreme court and of the courts of common pleas to review of quasi-judicial administrative orders.

The court did not reach the question of whether appellate review of a rulemaking order is proper in the court of appeals. Rather, it viewed the issue before it more narrowly: regardless of whether appellate review is otherwise proper or improper, is the court of appeals precluded by *Fortner* from reviewing a quasi-legislative administrative order?[85] In finding *Fortner* inapplicable, the court relied primar-

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[82] 42 Ohio St. 2d 441, 329 N.E.2d 690 (1975).

[83] OHIO REV. CODE ANN. § 3745.04 (Page Supp. 1975) provides that "actions" of the Director of Environmental Protection, including the "adoption, modification, or repeal of a regulation," are to be appealed to the Environmental Board of Review, which has "exclusive original jurisdiction." Thus Revised Code § 119.11, which provides for appeal of state agency rule making to the court of common pleas, is inapplicable to the Ohio Environmental Protection Agency.

[84] OHIO REV. CODE ANN. § 3745.06 provides in pertinent part:

> Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin county, or, if the appeal arises from an alleged violation of the law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred.

[85] Neither the court of appeals nor the supreme court responded to the argument of Union Camp that the order appealed was not the Director's rule-making order, but a preliminary procedural order of the Environmental Board of Review, thus rendering *Fortner* inapplicable.

ily upon the absence of the term "proceedings" in the constitutional definition of the jurisdiction of courts of appeals.

The holding in *Fortner*, however, was based upon more than the quasi-legislative, quasi-judicial distinction, and included the notion that *all* rule-making appeals fail to present justiciable questions. Yet the court in *Union Camp* suggested a retreat from that position. First, in a footnote, it strongly implied for the first time that the premise set forth in the second syllabus in *Fortner*—that all rule-making appeals are per se nonjusticiable—is not wholly separate from the jurisdictional limitation drawn from the word "proceedings" in the constitution.

> This paragraph of the *Fortner* syllabus is a direct quote from the fifth paragraph of the syllabus in *Zangerle*. It should be recalled that *Zangerle* concerned an appeal to this court, *Fortner* involved an appeal to the Court of Common Pleas, and both cases turned upon the same constitutional phraseology.[86]

Indeed, if the per se nonjusticiability standard developed in both cases turned upon the word "proceedings"—a conclusion nowhere suggested in *Zangerle* and *Fortner*—*Union Camp* represents a significant shift in the court's prior position.

The second indication of the court's movement away from the position that all rule-making appeals ipso facto fail to present justiciable questions is found in the following language:

> The second paragraph of the *Fortner* syllabus sets forth a general statement of familiar judicial doctrine. It should not be taken as a sweeping eradication of the protection against significant bureaucratic abuse which is derived from judicial scrutiny of the activities of regulatory agencies. For example, see the syllabus in *Burger Brewing Co. v. Liquor Control Comm., supra*.[87]

Most significant in this passage is the reference to the decision in *Burger Brewing*, in which the court found justiciable questions presented on the face of regulations with which regulated parties must immediately comply. This strongly suggests an equation of an appellate proceeding in the court of appeals with an action in declaratory judgment, and consequently that justiciability is to be determined upon the facts of each case rather than denied by an irrebuttable presumption of nonjusticiability in all rule-making appeals.

In remanding the case to the court of appeals, the court qualified its intimation of approval of appellate review of rule making in the

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[86] 42 Ohio St. 2d at 445 n.5, 329 N.E.2d at 692 n.5.

[87] *Id.* at 444-45, 329 N.E.2d at 692.

court of appeals. It noted that while *Fortner* did not compel dismissal of the appeal, dismissal may have been proper on another ground:

> In the instant case, pregnant statutory language found in R.C. Chapter 3745 remains to be interpreted (at a time when it is properly before us), and the effect of Section 3(B)(2) of Article IV of the Constitution of Ohio upon the new statutes must be determined (which was not done below by virtue of the dismissal). We cannot properly settle these issues upon the record herein, except to announce our conclusion, necessary to a resolution of this appeal, that nothing in the decisions thus far announced by this court mandates the result reached by the Court of Appeals.[88]

Thus the court simultaneously hints of future disapproval of rule-making appeals to the courts of appeals, yet concludes that it would have to do so on a basis other than those developed "in decisions thus far announced by this court."

C. *In re Appeal of Buckeye Power, Inc.*

Union Camp indicates that the courts of appeals might be used for rule-making appeals. A decision rendered only two weeks later, however, indicates that such appeals must be carefully limited. *In re Appeal of Buckeye Power, Inc.*,[89] presented the supreme court with an appeal taken directly to it from the adoption of regulations by the Power Siting Commission.[90] The appellant electric utility companies contended that the regulations exceeded the authority granted the Commission in its organic statutes.[91] The court sua sponte dismissed the appeal without mention of a limitation of its appellate jurisdiction to quasi-judicial, non-rule-making administrative orders.[92] Rather, it dealt solely with justiciability, noting that the appellants' challenge was not to the regulations as applied in a specific case. The court's apparent reassertion of the doctrine that rule-making appeals fail to present justiciable questions seems anomalous in light of the language of *Union Camp* that review of rule-making appeals in the court of appeals is not precluded by previous supreme court decisions. Surely, the supreme court is no more limited in deciding justiciable questions

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[88] *Id.* at 445, 329 N.E.2d at 692.

[89] 42 Ohio St. 2d 508, 330 N.E.2d 430 (1975).

[90] The provision for direct appeal to the supreme court is found in OHIO REV. CODE ANN. § 4903.12 (Page 1954): "No court other than the supreme court shall have the power to review, suspend, or delay any order made [by the Power Siting Commission]. . . ."

[91] OHIO REV. CODE ANN. §§ 4906.01-.99 (Page Supp. 1975).

[92] Noting the single ground invoked in the majority opinion, three justices in a concurring opinion reminded the majority of the jurisdictional issue set forth in *Zangerle* as a separate basis for the dismissal. 42 Ohio St. 2d 510, 330 N.E.2d at 431.

than are the courts of appeals. Thus it is not clear whether the court in *Buckeye Power* determined from the record before it that justiciable questions were not presented or held that all rule-making appeals as a matter of law fail to present justiciable questions.

It seems reasonable to conclude that the crack in the barrier against rule-making appeals opened in *Union Camp* has not been resealed by *Buckeye Power*. *Union Camp*'s retreat from an all-encompassing justiciability preclusion rests upon reference to *Burger Brewing*, in which the court held that the adoption of regulations immediately binding upon regulated parties presents justiciable questions. *Buckeye Power* can be viewed as consistent with this justiciability standard, for the Power Siting Commission's purpose is to certify that new utility facilities are needed to maintain service and that such facilities have the minimum adverse impact on the environment.[93] Because the Commission does not regulate the present operations of the appellant utilities, a concrete interest on their part in challenging the regulations would arise only upon an application for certification of a new facility. In this sense, the utilities were not placed in the dilemma discussed in *Burger Brewing*, in which the regulated parties were asked to comply immediately with regulations against which they had no adequate vehicle for challenge.

While *Union Camp* and *Buckeye Power* do not represent an explicit reevaluation of the *Zangerle* and *Fortner* holdings, they do demonstrate sufficient conceptual fluidity to warrant the conclusion that the court, in proper circumstances, would approve judicial appellate review of administrative rule making. To improve the potential for judicial approval, statutes providing for direct review must be carefully drafted to be as consistent as possible with the existing case authority.

VI. A Conceptual Proposal For Legislative Reform

It is difficult to accurately predict the circumstances in which the Ohio Supreme Court would permit judicial appellate review of administrative rule making. Almost any proposal for legislative reform arguably would conflict with language found in one or more of the court's decisions. It is submitted, however, that the advantages of direct appeal over actions in declaratory judgment, and the indications in *Burger Brewing*, *Union Camp*, and *Buckeye Power* that the court may be receptive to direct appellate review, warrant an attempt to create an acceptable appellate remedy by legislation.

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[93] Ohio Rev. Code Ann. § 4906.10 (Page Supp. 1975).

Prior decisions indicate two principal hurdles to appellate review of rule making. The first—limitation of appellate jurisdiction of the courts of common pleas and the supreme court to review of quasi-judicial orders— can presumably be overcome by providing that judicial review originate in the court of appeals, to which such limitation does not apply.[94] In order to avoid the possibility of conflicting decisions, and to encourage the development of a court with expertise in administrative law, appeals should be directed to one appellate district, preferably the Tenth District encompassing Franklin County.

A more formidable obstacle to approval of appellate review of administrative rule making is the court's view that the act of rule making does not present justiciable questions on appeal. Yet in *Burger Brewing* the court viewed actions in declaratory judgment as presenting justiciable questions for review. This demonstrates that justiciable questions may arise as part of challenges to regulations in contexts other than quasi-judicial administrative proceedings. Thus direct appellate challenges to regulations may be approved by the court if the statutes creating this remedy incorporate the primary teaching of *Burger Brewing*—that the appellant must demonstrate a justiciable challenge to the regulations. Such statutes should contain a standing requirement and should provide for judicial discretion to assess the hardship to the appellant if pre-enforcement relief is denied, as well as to determine whether speedy relief is necessary to preserve the rights of the appellant.

The issues cognizable in such an appeal must be carefully limited. A distinction should be drawn between challenges to the facial and procedural validity of a regulation and challenges to the propriety of the regulation as applied to an individual regulatee.[95] Facial issues can be promptly decided in an appeal from the adoption of the regulation solely on the basis of the rule-making record: issues arising from specific applications of the regulation should await review on

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[94] *See* section V *supra*. A question may arise as to the jurisdiction of the supreme court to review decisions of the court of appeals in rule-making appeals, in light of the holding in *Zangerle* limiting the jurisdiction of the supreme court to review of non-rule-making administrative orders. It is inconceivable, however, that the supreme court would decline on the basis of *Zangerle* to review these appellate decisions. The court could base review upon its general jurisdiction to review decisions of courts of appeals. OHIO CONST. art. IV, §§ 2(B)(2)(a)(iii), (d).

[95] Statutes creating an appellate remedy should require such a showing to be made to the agency as part of rule-making proceedings. For example, Revised Code § 119.03 requires publication of proposed regulations, a public hearing, and receipt of written comments on the proposals. The prospective appellant can make his showing of immediate adverse impact of the proposed regulations as part of these proceedings, which becomes a part of the record on appeal.

the basis of a record developed in an adjudicatory proceeding.[96]

Finally, statutes providing for direct appeal should specify a period of time after promulgation of the regulation within which the appeal must be perfected.[97] The very purpose of a direct appellate remedy is to provide prompt judicial determination, on the basis of the record developed before the administrative agency, of the facial validity of a rule-making action. A proper record of the rule-making proceeding will contain not only the agency's justification for its proposed regulation, but also the positions, arguments, and evidence of proponents and opponents of the proposal. Prompt appeal insures timely review of challenges to the regulation upon a record which has not become stale, but rather accurately reflects the parties' current position in opposition to, and support of, the rule-making action. Moreover, such an appeal by its very nature involves generic issues affecting subsequent application of the regulation, and should be promptly commenced and decided. Prompt notification of the perfection of the appeal permits the agency to determine how, if at all, the regulation should be implemented pending the court's decision.[98]

The appellate remedy described above is not certain to obtain the supreme court's approval. However, it provides the prompt relief which the court in *Burger Brewing* recognized as necessary to protect regulated parties, and is far preferable to an action in declaratory judgment. Furthermore, deferral to appeals from quasi-judicial proceedings of issues requiring reference to an adjudicatory record protects the appellate courts from deciding such matters in the absence of an appropriate factual record developed in an adversary proceeding.

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[96] At least one Ohio court has recognized that a distinction may be drawn between generic issues subject to resolution on the basis of a rule-making record and issues that require reference to a record demonstrating specific application of the regulation. Battles v. Ohio State Racing Comm., 12 Ohio App. 2d 52, 230 N.E.2d 662 (1967). This distinction is not sharply defined, and would require case-by-case development of the issues cognizable in a rule-making appeal. However, this distinction is central to an appellate remedy from administrative rule making and easily justifies an expenditure of judicial energy to sharpen its contours.

[97] A matter deserving greater study is whether one who foregoes appellate review thereby waives his right to raise issues cognizable on appeal in a later proceeding, *e.g.*, as part of an action to enforce the regulation. Were certainty the only criterion, waiver should be invoked to assure the agency that if no appeal is taken from promulgation the regulation is thereafter immune from facial attack.

[98] OHIO REVISED CODE ANN. § 119.11 (Page 1969), which was struck down in *Fortner*, included the harsh provision that a perfected appeal postponed the effective date of the regulation pending the court's decision. *Id.* It would be preferable either to provide for automatic suspension only as applied to the appellant, or to provide the court with authority to suspend the regulation upon proper motion, in a manner analogous to the issuance of a preliminary injunction.

A statute providing for direct appeal would be of sufficient value to merit enactment. It would allow appellate review of administrative rule making on the basis of an appropriate record and in a context which ensures the presence of adverse parties seeking to litigate justiciable questions. Legislative and judicial endorsement of such a statute would constitute a significant advance in Ohio administrative law.